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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 03 2005

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Marie Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner seeks employment as a researcher. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

It appears from the record that the petitioner seeks classification as an alien of exceptional ability. This issue is moot, however, because the record establishes that the petitioner holds a Ph.D. in chemical engineering from Leeds University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that

exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The director did not dispute that the petitioner works in an area of intrinsic merit or that the proposed benefits of her work would be national in scope. The petitioner focuses on the use of catalytic reactions (catalysis) to remove the toxic byproducts of burning biomass. Previously, the petitioner worked for the National Renewable Energy Laboratory (NREL). While this work was funded by [redacted] it appears to have applications to the renewable energy industry in developing cleaner burning biomass energy plants. At the time of filing, however, the petitioner was working directly for [redacted] Counsel asserts, and several of the references affirm, that the petitioner's work at [redacted] is still applicable to pollution reduction as well as developing a safer cigarette. The director accepted that both proposed benefits, pollution reduction and safer cigarettes, are in the national interest. Often, little evidence is needed to establish that a researcher's area of work has intrinsic merit and that the benefits will be national in scope. Nevertheless, it is still the petitioner's burden to meet each of these elements. We do not question that reduced pollution from biomass burning plants has intrinsic merit and that the benefits will be national in scope.

The proposition that less toxic cigarettes are similarly in the national interest, however, is a complex one that warrants supporting evidence from disinterested parties outside the tobacco industry, preferably in the health field. While we do not find that the development of less toxic cigarettes is definitely not in the national interest, some questions remain unanswered by the record. Specifically, if the cigarettes are only "safer" without being as safe as not smoking at all, it becomes relevant whether such cigarettes would discourage from quitting some smokers who might have otherwise quit or encourage nonsmokers to start smoking who otherwise might not have started. Without views from health experts outside the tobacco industry, such as high-level officials at the American Lung Association or the American Cancer Society, we cannot conclude that the petitioner has met her burden on this issue. Thus, the petitioner has not established that anyone other than [redacted] will benefit from her work on reducing the toxic levels of cigarettes.

In light of the above, we will only consider whether the petitioner's current and proposed work at [redacted] is likely to produce the proposed benefits of reduced pollution from biomass-burning plants. Eligibility for the waiver must rest with the alien's own qualifications rather than solely with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the

petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. That said, we look to the petitioner's past record of achievement only insofar as it relates to the possibility of future contributions. The national interest waiver is not an award for past achievement, but a means of securing future benefits to the national interest. Thus, the work the petitioner intends to pursue is as relevant as her past achievements.

At the outset, we acknowledge that biomass-burning plants produce many of the same toxins as cigarettes. Thus, we acknowledge that the petitioner's skills are applicable to both issues. Nevertheless, the more directly the benefits flow from the petitioner's work, the less speculation is required to conclude that the petitioner is likely to produce those benefits. In other words, it is more speculative to presume that other industries will adopt the petitioner's results than to presume that her employer will. For example, on appeal, the petitioner submitted a patent application listing her as an inventor for an innovation relating to cleaner burning cigarettes. The record does not include patent applications for biomass-burning plants that either list the petitioner as an inventor or cite her work at [redacted]

Initially, the petitioner submitted letters detailing her work prior to joining [redacted] a supervisor of the petitioner's Master's thesis, asserts that this work involved characterizing packing materials used in an engineering process to clean toxic gas streams through the saved energy resulting from more efficient mass transfer. While this work involved a collaboration with Germany, Mr. [redacted] does not explain how this work impacted the area of catalysis, in which the petitioner now works.

Dr [redacted] the petitioner's Ph.D. thesis advisor, praises this work, noting that it led to 10 published articles. He fails to discuss the focus of this work, however, discussing instead the importance of the petitioner's subsequent work with controlled pyrolysis.

The petitioner also submitted two letters from colleagues at NREL. Dr. Steven Slayzak focuses mostly on the importance of the petitioner's area of research at NREL, giving some general praise of the petitioner's abilities. Dr. [redacted] provides more discussion of her actual projects. He explains that the petitioner focused on catalytic and high temperature chemical conversion systems. He further explains that this work "includes the practice of molecular beam mass spectrometry (MBMS) for the study of complex chemical systems, with emphasis on biomass and biopolymer thermo-catalytic conversion." Dr. [redacted] continues that the petitioner is one of twenty doctoral-level researchers with experience in this technique, and one of ten who is also an expert practitioner of multivariate statistical analysis. Simple exposure to advanced technology constitutes, essentially, occupational training which can be articulated on an application for a labor certification. Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *Id.* at 221. Dr [redacted] further states that the petitioner "developed kinetic modeling techniques for the data from these techniques, allowing the empirical modeling of extremely complicated chemical reactions." He concludes that the "research community is anticipating that her continued work in this area will provide an understanding of biomass thermal conversion." While he concedes that the petitioner no longer works "in bioenergy," he nevertheless asserts "the work she is presently doing and publishing will greatly aid my colleagues and me in continuing to develop new approaches to the study of our biomass conversion." Without additional explanation, this last prediction appears somewhat speculative.

Finally, the petitioner submitted a letter from Dr. [redacted] a senior principal scientist at [redacted] who directed her project at NREL and in whose laboratory the petitioner is currently working. Dr. [redacted] provides some technical discussion of the petitioner's work, but it is unclear if he is discussing her work at NREL or [redacted] and he fails to explain the goals of the petitioner's current work at [redacted] Specifically, he states that "during the last several years" the petitioner's findings "in the area of thermo-chemical

conversion of biopolymers have led to a significant understanding in pathways leading to formation of undesirable products such as polycyclic aromatic hydrocarbons (PAHs) with a [sic] great health and environmental impacts." He concludes that the petitioner's "previous and current work in the areas of renewable energy source, reduction of harmful by-products of gasification and combustion systems on environment and reduction of risk in cigarette smoking are exceptional." As Dr. [redacted] groups both the petitioner's work for NREL and [redacted] together in the same sentence, he is ambiguous about whether the petitioner's current and proposed work will contribute to reduced pollution from biomass-burning plants.

In support of the claims made in these letters, the petitioner submitted evidence of her presentations and published articles. She also submitted a list of citations of her work prepared by [redacted] While counsel focuses on the total number of citations, we note that while the petitioner's 1998 articles were cited 16 and 17 times, her most cited articles published in 1999 have been cited six and nine times. All of these articles were coauthored with Dr. [redacted] and, thus, appear to represent her Ph.D. thesis work. None of her more recent articles have been cited more than four times. As stated above, Dr. [redacted] implies that the petitioner's thesis work was in a different area than her current work.

The petitioner also submitted evidence of her professional memberships and fellowship at the University of Leeds. The petitioner did not submit any evidence that her memberships are indicative of an influence in the field. For example, the materials for the American Chemical Society (ACS) indicate that "membership is for everyone," that it has 163,000 members and that all that is needed for full membership is a certain level of education and experience. Regardless, professional memberships are merely one criterion for aliens of exceptional ability, a classification that normally requires a labor certification. We cannot conclude that meeting one, or even the requisite three criteria for that classification warrants a waiver of that requirement. Finally, the fellowship appears to cover the petitioner's studies for her Ph.D. Fellowships based on academic achievements are not persuasive. Specifically, academic performance, measured by such criteria as grade point average, cannot alone satisfy the national interest threshold or assure substantial prospective national benefit. In all cases the petitioner must demonstrate specific prior achievements that establish the alien's ability to benefit the national interest. *Matter of New York State Dept. of Transp.* at 219, n.6.

The director concluded that the affidavits did not establish that the petitioner's work constitutes a breakthrough in her field and that the record did not establish that a similarly trained researcher could not make similar contributions.

On appeal, counsel reiterates the importance of efficient biomass-burning plants, a point we do not contest. Counsel quotes from the letters submitted previously and those now submitted on appeal, concluding that the petitioner's contributions to the field have been remarkable and sustained. For the reasons discussed above, we find that the attestations in the initial letters are too speculative regarding the claim that the petitioner's proposed employment will produce the proposed benefits in the national interest. We will consider the new letters below.

In a new letter, Dr. [redacted] asserts that "during her residence in the United States" the petitioner has developed modeling techniques derived from her MBMS and multivariate statistical analysis. Once again, this letter is ambiguous regarding whether these techniques were developed at NREL or at [redacted] Dr. [redacted] ranks the petitioner as one of the top experts in the field who has made highly significant contributions to the field. While he concludes that her future work "will continue to have significant positive impact upon her field and the United States" he does not explain what that future work will be or how it is applicable to biomass burning for energy.

Dr. [redacted] asserts that the petitioner's "on-going" work for [redacted] "is a natural continuation of her studies of thermal and catalytic transformations directed at sustainable technological developments." He further states:

Additionally, she is the co-inventor of one significant patent application, in which she utilized nanotechnology to destroy toxic compounds in the process of biomass conversion. The nanotechnology is a cutting-edge research area utilizing nanoscale materials ($10^{-7} - 10^{-9}$m range) and is used in electronic, biomedical, pharmaceutical, cosmetic, energy, catalytic and materials applications. Consequently, her scientific findings on the effects of such nano-material on the removal of toxic compounds have great impact on this research community and, indeed, led to the U.S. patent application in applying nano-material to biomass utilization.

The record does not support [redacted] characterization of the petitioner's patent-pending innovation as having broad applications. The title of the proposed patent is "Oxidant/catalyst nanoparticles to reduce tobacco smoke constituents such as carbon monoxide." A review of the claim reveals that it involves an additive to the filler of a cigarette; [redacted] does not explain how this innovation is applicable beyond cigarette manufacture.

[redacted] discusses the importance of the petitioner's work at NREL and asserts the petitioner "is and will continue to be one of the key leading researchers" in the area of pollution control, but fails to explain how the petitioner's current work relates to this area.

[redacted] Chief Technology Officer for Headwaters NanoKinetix, Inc., discusses the petitioner's presentations at nanotechnology conferences in 2002 and 2004 that he organized. He concludes that the petitioner's work is important "to tackle our future energy problems by reducing our dependency on foreign oil." [redacted] does not explain why the petitioner's work at [redacted] is more vital towards this goal than the work of similar researchers working directly for the biomass-burning industry.

[redacted] a senior staff member at Oak Ridge National Laboratory, reiterates the claim that the petitioner's skills are unique. We reiterate that it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dept. of Transp.* 22 I&N Dec. at 221. Dr. [redacted] also discusses the importance of the petitioner's MBMS techniques and asserts that the results from this work "have been used to guide my experiments and they have provided new insights in the thermal reactions of energy resources." The record does not establish that the petitioner's MBMS work was performed while working directly for [redacted] and that her continued work at [redacted] will continue to advance this technique in a manner relevant outside the tobacco industry.

[redacted] head of a Philip Morris research department in Switzerland, acknowledges that his expertise is in tobacco chemistry and analysis, but professes that the petitioner's research area "is without doubt very important for most responsible industries as well as public health authorities, environmental and government agencies." [redacted] fails to identify any impact to other industries derived solely from the petitioner's work at [redacted] Such claims would be more persuasive coming directly from those industries.

Dr. [redacted] a professor at Louisiana State University and a member of the editorial board of journals that have published the petitioner's work, asserts that she is familiar with the petitioner's work through a collaboration with [redacted] asserts that the results from the petitioner's work with PAH formation "are of significance for both health and environmental concerns." We do not contest that the petitioner's past research has implications for the environment and that her current work is focused on less toxic cigarettes, which might have health implications. The question is whether the petitioner's proposed

work for [redacted] will benefit the national interest as claimed [redacted]'s letter is not persuasive that such a claim is more than mere speculation.

[redacted] a chemistry consultant to industry, notes the importance of the petitioner's work in the reduction of biomass tar. [redacted] does not indicate that he is a consultant for any company in the biomass-burning/renewable energy industry or identify how the petitioner's results have been applied in that industry.

Ultimately, the petitioner has not established that the national interest would be served by waiving the labor certification process. As implied by the director, the unique skills discussed by the petitioner's references appear amenable to enumeration on an application for labor certification. The claim that her skills are unique is under the jurisdiction of the Department of Labor. Finally, while the petitioner has clearly worked in an area of national importance in the past, and her current work is not unrelated to that work, her proposed employment would appear to be primarily aimed at benefiting her employer [redacted] We cannot conclude that the national interest waiver was conceived as a means to benefit a single employer. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Matter of New York State Dept. of Transp.* 22 I&N Dec. at 223.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.